85-1317

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. TUCKER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Three significant constitutional questions are presented:

I.

Due Process And Public Trial.

Was petitioner, Robert L. Tucker, a Chicago trial lawyer, whom the record shows to have an impeccable general reputation for good character and integrity, deprived of Fifth Amendment due process, and the right to an impartial "public trial," required BY the Sixth Amendment, when:

A. The public prosecutor, prior to and during the trial, secretly, without the knowledge of, or any notice whatsoever to petitioner or his attorneys, submitted to the trial judge in chambers, random, false, derogatory and prejudicial ex parte communications,

including an FBI "informant's report" which falsely accused petitioner of participating in other heinous crimes, including international gun-running and the importation and sale of narcotic drugs -- even though the government acknowledged in its brief on appeal the falsity of the accusations, admitting that the information contained in the "informant's report" was totally uncorroborated?

B. Do the fairness, due process and "public trial" provisions of the Constitution apply to all stages of the trial proceedings, or merely to what the jury is allowed to see, hear, weigh and determine?

II.

Harmless Error Versus Due Process

II. What are the lawful boundaries of the harmless error doctrine?

A. In an admittedly close case, where the defendant's conviction rests solely on the testimony of a single witness whom the court found to be "unreliable," is there any reasonable and principled basis for holding that it was "harmless" to exclude evidence from the jury during its deliberations which directly impeached that "unreliable" witness's credibility?

B. Did the court, in affirming the conviction, fail to apply the "proof beyond a reasonable doubt" standard required in criminal cases under the due process clause, when it held that the evidence was sufficient despite the fact that on the one hand the testimony of the sole incriminating witness against petitioner, one Irving Pheterson, was too unreliable to support a conviction and, on the other hand, but for Pheterson's testimony "the evidence fell far

short of proving Tucker's" guilt (Slip Op., p. 4)?

The Court of Appeals held:

1. That but for the testimony of a single witness, namely Pheterson, who was the principle architect of the fraud charge and who testitifed under a grant of immunity, the evidence "fell far short of proving Tucker's participation in the fraud beyond a reasonable doubt" (Slip Op., p. 4).

2. That Pheterson was "an unreliable witness," "troubled," "evasive," "desperate for immunity and selective and self-justifying in his recollections . . ." (Slip Op., pp. 3, 4, 6), so much so that his testimony, standing alone, would be insufficient to sustain a conviction (Slip Op., p. 4).

3. That the trial court erred in excluding, on the ground

> that it was hearsay, a "weird," "rambling" letter written by Pheterson to the prosecutor which was directly impeaching of Pheterson's credibility, and which perfectly fitted petitioner's theory that Pheterson made up his incriminating testimony against Tucker because he believed he had to do so to obtain immunity."*

The Court, nevertheless, affirmed Tucker's conviction on the theory that there was corroboration of Pheterson's

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*Pheterson's letter to the prosecutor states, inter alia, "You have presented me with a scenario," and goes on to recite his incriminating story (which he is now able to do after a "war" between his "undersoul" and his "oversoul") and closes "everytime I start to writing, I feel that I am not 'saying it right' so I tear up and start over I hope this is what you need. Please advise."

testimony (albeit with evidence which was also consistent with Tucker's innocent role as a lawyer in the transaction) and that the erroneous exclusion of Pheterson's letter was harmless.

III.

RACIALLY MOTIVATED PEREMPTORY EXCLUSION OF PROSPECTIVE JURORS

Was Tucker, a black lawyer representing, in this case, a white female client, deprived of his right to a representative impartial jury under the Fifth and Sixth Amendments, when the government used four of its seven peremptory challenges to eliminate all four blacks from the venire, and where the government's "non-racial explanation," for its peremptory challenges was received by the trial judge ex parte and never disclosed to petitioner during the trial, and was subsequently revealed by an expert to be pretextual?

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

ROBERT L. TUCKER,

Petitioner,

-Vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STAES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Petitioner, Robert L. Tucker, prays that a writ of certiorari be issued to review he decisions of the United States

Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

Two opinions and five separate orders in proceedings below frame the issues raised in this petition.

The opinion of the Court of Appeals for the Seventh Circuit, filed on September 6, 1985, affirming the judgment of conviction fo the U.S. District Court and resolving all issues against the defendants, is reported at 773 F.2d 136 (1985). The Slip Opinion is attached hereto as Appendix B.

A subsequent order of the Court of Appeals, enetered sua sponte, on December 30, 1985, in the case of United States ex rel. Frank Teague v. Michael Lane, et al, No. 84-2474, ordered a rehearing en banc, on the issue of racially motivated peremptory exclusion of black persons from the petit jury that convicted Teague, a black Illinois state court defendant. That order, with a dissenting opinion by Judge Richard D. Cuadhy, is attached hereto as Appendix D.

This petitioner's motion to vacate the Court of Appeals order of December 5, 1985, denying this petitioner's Petition

for Rehearing En Banc and to consolidate this cause with Teague for rehearing en banc on the Sixth Amendment issue, and Court of Appeals order denying that request for rehearing and consolidation, are attached hereto as Appendices E and F.

By summary orders entered by the Court of Appeals on November 7 and 19, 1985, the request of the President of the Cook County Bar Associatin, joined in by the Dean of the Northwestern University School of Law, for leave to file an "Amicus Curaie Statement" in support of the Petition for Rehearing En Banc (Appendix G) and the same unanimous

request of the Board of Managers of the 19,000 member Chicago Bar Association (Appendix H) urging rehearing en banc on the issues raised in this petition for certiorari, were denied by the Appeals Court panel. The motion of the Chicago Bar Association for leave to file such amicus statement is attached hereto as Appendix I.

JURISDICTION

The judgment appealed from was entered by the Court of Appeals for the Seventh Circuit on September 6, 1985. This petitioner's Petition for Rehearing

En Banc, was denied on December 5, 1985, and petitioner's motion to vacate the order of December 5, 1985, and to consolidate this cause with Court of Appeals No. 84-2474, in which rehearing en banc has been ordered, was denied on january 28, 1986.

This Court's jurisdiction is timely invoked within 60 days from the date of the denial of this petitioner's Petition for Rehearing En Banc, pursuant to the provisions of 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the Constitution

of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public

> trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

This is not a case brought to this Court by a petitioner-lawyer simply bemoaning his conviction in a criminal proceeding. This is a case where a petitioner-lawyer, who happens to be black, desires to call to this Court's

attention, for possible remedy, procedural and substantive due process and equal protection questions which have so contaminated the trial of criminal cases in the Chicago area, and possibly elsewhere, as to have persuaded virtually the entire organized bar in Chicago to request leave to file briefs amicus in the Seventh Circuit, urging the full Court to address these abuses. Leave was denied the Chicago Bar Association and the President of the Cook County Bar Association, joined in by the Dean of the Northwestern University School of Law, to file amicus statements.

Prior to his conviction in this case, petitioner, Robert L. Tucker, had practiced law in the City of Chicago for 27 years. He enjoyed an unblemished and indeed extraordinary reputation for honesty and integrity among lawyers, including prosecutors, judges, civic, business and religious leaders throughout the city. The trial judge, at sentencing, took special note:

> "Mr. Tucker, . . . you could not improve on the testimonials offered during the trial of your case. It is funny, but you and I are of different ages; while I think we both are products of the city, we came up at different times and went to different schools, practiced in different circles, and

yet I was overwhelmed by the coincidence of the people who testified on your behalf; overwhelmed by the coincidence that all of those people -- or at least virtually all of those people -- were friends of mine and if I had been in some trouble and would have had to ask them to say something about me, I would have been flattered if they said the same things about me that they said about you. That could not have been improved upon on any way . . ." (Tr. February 24, 1983, pp. 64-65).

Petitioner was indicted along with two other persons, on nine counts of wire fraud and one count of making a false statement to a federally insured bank. The trial of the case lasted some six weeks, and the facts were quite extensive. In essence, the charges against

this petitioner arose from a complicated transaction for the sale of a large quantity of black beans to the government of Guatemala, in which this petitioner, a member of the bar of the State of Illinois, represented a client, one Debra Bell, an international comodities broker who had already negotiated and signed a contract with Guatemalan authorities for the sale and purchase of the beans.

Petitioner's former client and co-defendant, Debra Bell (Court of Appeals No. 83-1439), has previously docketed her separate petition for a writ of certiorari in this Court.

The fraud charges stem from the fact that in order to obtain and make payment for the beans, forged documents were supplied to Continental Illinois National Bank of Chicago, which held a letter of credit from the National Bank of Guatemala, and paid out to petitioner's client some $5,000,000 in reliance on the documents. There is no dispute that the documents were forged. A third defendant, one Michael Ball, a Miami, Florida, freight forwarder, has sought no relief in this Court from his conviction and four month sentence.

A. Secret, False, Prejudicial Ex Parte Communications To The Judge.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, sentencing this petitioner to the custody of the Attorney General for a term of 15 months, was entered on February 24, 1983.

On that day, and not before, petitioner learned from the comments of the trial judge that at some point prior to the opening of the trial on December 6, 1982, the prosecutor, without the knowledge of, and without any notice

whatsoever to the attorneys for petitioner, secretly, submitted to the trial judge in chambers a false, derogatory, and prejudicial written FBI "informant's report" which, among other things, falsely accused this petitioner of having been unlawfully engaged, allegedly with petitioner's client and co-defendant, in the running of guns and other armanents to rebel forces in El Salvador, and further falsely accusing petitioner of being involved, with petitioner's client, in the importation and sale of narcotic drugs.

At the time of the foregoing secret

pre-trial submission to chambers by the prosecutor, the trial court had under advisement, petitioner's pre-trial motions, to inter alia, dismiss the indictment for numerous alleged acts of prosecutorial misconduct, and for a hearing into the competence of the government's sole incriminating witness against this petitioner, based upon that witness' sworn acknowledgement, or claim in prior judicial proceedings of having previously suffered permanent brain damage in a personal injury accident, which in the witness' own words, under oath, impaired his ability to "remember things" and to recall facts.

Petitioner's pre-trial motions were denied by the court, and in its brief on appeal, the government acknowledged the baselessness of the above-described secret pre-trial submissions to the trial judge, admitting that the content of the said FBI "informant's report" was totally uncorroborated.

On May 9, 1984, 16 months after the trial, and six months after petitioner's brief on appeal had been filed, upon the persistent demand and motion of petitioner's appellate counsel (not the same as the attorneys who served on the trial), the trial court entered an order

(see order of the district court, App. A), directing the government to turn over to petitioner and his attorneys by 5:00 p.m., on the date that the order was entered, "a copy of all materials submitted to the court in camera, in connection with the trial of this cause, which materials relate to information provided to the government by or about James Gunnel's," (a government informant); and

> "a list of all additional materials supplied to the court by the government, in camera, in connection with the trial of this cause, which list shall identify the source of the document and describe, in general terms, the subject matter of the submission."

The court ordered access to the documents, information and materials which were the subject of the order of May 9, 1984, to be limited to the defendants and their attorneys.

Thereupon, on May 10, 1984, after briefs had been filed on appeal, petitioner and his attorneys learned for the first time, that in addition to the secret pre-trial submission to chambers by the prosecutor described above, the government also secretly submitted and the trial court received and examined in chambers on the dates indicated below, the following false, derogatory and

prejudicial materials and information; the secret transmittal of which is now fully admitted by the government (see Justice Department letter to counsel for defendants turning over materials, dated May 10, 1984, App. A-1):

> 1. A secret letter to the trial judge, from the prosecutor, dated October 15, 1982, (fifty-one (51) days prior to the opening of the trial) containing a full blown statement of the "government's theory of the case," accompanied by certain grand jury exhibits, and selected transcripts of the grand jury testimony of 10 government witnesses, and expressly inviting the judge's attention to specific pages of the transcript "for evidence specially of Mr. Tucker's (petitioner) involvement."

This secret letter closed with the observation: "If the court has any questions about any exhibits please let me know. . . ."

2. A secret written statement from the prosecutor to the trial jduge dated December 1, 1982 (five (5) days before the opening of the trial), describing to the trial judge an occurrence in the grand jury room, in which a grand juror, who happened to be an employee of the First National Bank of Chicago, interrupted the grand jury proceedings to advise that she knew this petitioner, and had been introduced by this petitioner to another person who was identified as a government witness. This secret submission was made to the trial judge in support of the government's false accusation and "theory" that this petitioner was involved with Guatemalan nationals in "laundering" dirty money, as the

prosecutor would later argue to the jury. The statement from the prosecutor further advised the trial judge that the particular grand juror, having been excused for grand jury service, was to be converted to a government witness, and that "the fact that she sat on the grand jury for a brief time . . . should have no effect on her testimony, and need not be disclosed, in the government's view." The trial judge abided by the prosecutor's advice on both counts. He did indeed allow the First National Bank official to testify on the trial as a government witness (Tr. 2727-2734), and at no time did anyone, including the judge, ever inform the defense that the witness had also served for a time on the grand jury that returned the indictment against this petitioner.

3. An FBI internal report, secretly submitted by the

> prosecutor to the trial judge on December 8, 1982 (while the trial was under way), which falsely advised the trial judge that this petitioner had personally established a "leak" in the grand jury proceedings' "knew everything" that was going on the in grand jury room, and that this petitioner had, according to an unidentified "source," attempted to influence and bribe the key government witness to "change his statement." (Emphasis added).

Most of the above-described secret ex parte submissions were received and examined by the trial judge before the trial commenced. All were received and examined by the trial jduge before the trial was concluded, and prior to the return of the jury's verdict.

B. Impermissible Application Of The Harmless Error Doctrine.

The government's principal witness, and the only witness to incriminate this petitioner, was one Irving Pheterson, a Miami based commodities broker who purportedly owned or controlled the beans through a source in the Far East, and who was clearly the principal architect of the fraud. Pheterson received immunity for his testimony.

Simply stated, the issue as to this petitioner was whether petitioner was acting professionally as a lawyer,

unaware of the foregery, or was an active participant in the fraud.

The answer to that question depended entirely on the testimony and credibility of Pheterson whom, as the record shows, prior to September 3, 1980, in his law office, this petitioner had never met nor spoken to before in life. The panel expressly found that ". . . apart from Pheterson's testimony the evidence fell far short of proving petitioner's participation in the fraud beyond a reasonable doubt . . . ." (Emphasis added). Further, the panel found, that Pheterson was an "unreliable," "troubled," "evasive"

witness, "desperate for immunity, and selective and self-justifying in his recollections." Indeed, the panel found that Pheterson's testimony was so "unreliable," being for the most part consistent with Tucker's role as simply being a lawyer in the transaction, that a conviction on Pheterson's testimony alone could not stand. Even so, the panel held that other evidence, though not itself sufficient to convict, provided sufficient "corroboration" of Pheterson to permit affirmance. At the same time the panel also ruled that although the trial court had erred in excluding from evidence a

"rambling," "weird" letter written by Pheterson to the prosecutor, in the nature of a proffer of testimony which was highly impeaching of Pheterson's credibility, the error was "harmless."

In that letter, Pheterson stated that the prosecutor had "told me verbally your thoughts (emphasis added) regarding the proffer . . ." and "suggested to me that from your investigation of other people that you have created a possible scenario of events which led you to believe the following" (App. C., p. 1). Pheterson then goes on with a revised description of the "war" between his

"undersoul" and his "oversoul" (App. C., p. 5), and states that the prosecutor, by her vists and conversations has "started an opening" in the process of remembering the information relating to the aforesaid events . . . ." The letter then goes on to recite what became Pheterson's immunity testimony about "Bob Tucker" (petitioner), and states that, "I am extremely relieved that I can now share with you . . . . what you have been pressing for . . . " (emphasis added) (App. C., p. 4).

In "Part 2" of the letter, Pheterson ends by stating, "Every time I start to writing I feel that I am not 'saying it

right' so I tear it up and start over. I hope this is what you need" (App. C., p.8). In short, Pheterson's letter, the exclusion of which the panel expressly found to be error (App. B., p. 6), provided clear and dramatic support for this petitioner's charge that Pheterson's testimony against "Bob Tucker" was manufactured in response to what he, Pheterson, understood was a "scenario" which the prosecutor had developed, and which Pheterson believed he had to adopt in order to obtain immunity.

Pheterson's credibility, or lack of same, being the sole determinant of the

guilt or innocence of petitioner herein, the crucial question presented here is whether, as a matter of fundamental due process, petitioner was entitled to have the jury consider, and examine during their deliberations, the "weird", "rambling", "inconsistent," and "contradictory" two-part Pheterson letter; and whether the panel's holding that its erroneous excluson on the ground that it was hearsay (App. B., p. 6) was harmless, extends the harmless error doctrine beyond the limits imposed by reason and due process.

C. Racially Motivated Peremptory Exclusion Of Prospective Jurors In Federal Criminal Trials.

This Court now has under advisement the question of racially motivated peremptory exclusion of prospective jurors in state court proceedings. Batson v. Kentucky, 105 S. Ct. 2111 (1985). This petition presents the same issue in the special and now peculiar context of a federal criminal proceeding.

The current confusing strain and pull of inter-circuit conflict on this very vital question has now eclipsed and

has become confounded within the ranks of the Court of Appeals for the Seventh Circuit, by the disparate and inconsistent treatment of the exact same issue in two distinct cases, decided by different panels of the Seventh Circuit with respect to rehearing en banc, within 25 days of each other in the month of December, 1985.

This case, under advisement by one panel of the Court of Appeals for the Seventh Circuit for 16 months after oral argument, raised, inter alia, the question of whether the conscious, peremptory striking by the prosectuion of all black

prospective jurors from the jury that convicted this black petitioner violated the Sixth Amendment. The prosecution used four of its seven peremptory challenges to exclude the only four black persons in the venire. No reason was ever communicated to the defendants on trial for the prosecutor's conduct. However, in another ex parte conference with the court in camera, the government explained that it sought to seat an educated jury, with persons who had business experience. A subsequent analysis by petitioner's expert, which is of record on appeal, revealed the government's

purported "non-racial" explanation to the trial judge to be pretextual. No opportunity to challenge the government's secret explanation to the district court was afforded the defendants on the trial. One of the black prospective jurors with a high school education, had successfully operated his own small metal recycling business in the City of Chicago for 25 years. Three of the black venire persons had finished high school.

At the same time, white jurors were seated and served who had not completed high school, and who had no business experience at all. The conviction of

this petitioner was nevertheless affirmed and the prosecution's conduct was found to be lawful by the opinion of the panel on September 6, 1985. Rehearing en banc was denied on December 5, 1985.

In 1984, after this petitioner's case had been docketed on appeal, United States ex rel. Frank Teague a habeas corpus request by an Illinois state court defendant, Seventh Circuit, No. 84-2474, was filed, and raised as its only issue the same Sixth Amendment question of racially motivated exclusion of black prospective jurors from the jury that convicted Teague, also a black defendant.

A majority of the panel in Teague in an opinion written by Judge Richard D. Cudahy, concurred in by Senior Judge John Peck of the Sixth Circuit, sitting by designation, found that the conduct of the prosecutor, despite two benign rationales which denied racial motivation, violated Teague's Sixth Amendment rights. That panel ordered a new trial. One member of the Teague panel, Judge John L. Coffey, who also sat as a member of the panel in this case, dissented. The Teague opinion, before issuance, was circulated to the active judges of the Seventh Circuit pursuant to Seventh Cir-

Circuit Rule 16(e). On December 30, 1985, a majority of the active judges of the Seventh Circuit, sua sponte, ordered a rehearing en banc in Teague.

On january 28, 1986, the Seventh Circuit panel denied this petitioner's Emergency Motion to vacate its order of December 5, 1985, and to consolidate this cause with Teague for rehearing en banc, limited, if necessary, to the single question of the conscious peremptory exclusion of black persons from the trial jury in each case, solely on the basis of their race.

It would seem that fairness, due process and equal protection would have required a different determination by the Court of Appeals. Conceivably, should this Court deny this petitioner's request for a writ of certiorari, and should the Court of Appeals ultimately resolve the racially motivated exclusion of jurors question in favor of the defendant Teague, this petitioner would be left imprisoned, without benefit or protection of the Seventh Circuit's ruling, although this petitioner raised and argued that same Sixth Amendment question first; and while the Teague appeal was still pending.

REASONS FOR GRANTING THE WRIT

I.

SECRET, FALSE, PREJUDICIAL EX PARTE COMMUNICATIONS TO THE TRIAL JUDGE.

It would seem to be beyond question that when a prosecutor consciously and secretly submits false or highly prejudicial information and other materials regarding a defendant in a criminal case to the trial judge in that case, whether the issues are being tried to the bench or before a jury, the defendant's rights to due process of law and an impartial public trial, guaranteed by the Fifth and

Sixth Amendments have been violated. Gregg v. United States, 394 U.S. 489 (1969).

In addition to the rights of the individual defendant on trial, the honor of the judicial system, and public confidence in the fair administration of justice can only be impugned and sorely undermined if the conduct of the prosecutors in this case is to be approved. Holland v. United States, 348 U.S. 121 (19530.

The situation is all the more outrageous, though perhaps not legally distinguishable, when the prosecutor

subsequently conceded that the "charges" of obstruction of justice, international gun-running, smuggling of narcotics and bribing of a government witness were utterly false, and were directed at a defendant-attorney with an extensive and umblemished reputation for honesty and integrity in the community.

It strains common understanding and would probably stun legal scholars the world over that the Court of Appeals, in this case, accepted the prosecution's explanation that the admittely false and uncorroborated prejudicial information and materials were submitted to the trial

judge for Brady v. Maryland, 373 u.S. 83 (1963) determinations, and praised the prosecutors for their prudence. (App. B., p. 8).

Here, the doctrine of Brady and its fundamental purpose have not simply been misread and grossly misapplied. The doctrine of Brady has been exhaustively prostituted and stood on its head. Moreover, if the opinion of the Court of Appeals in this case is allowed to stand, an open invitiation will have been extended to prosecutors everywhere to pretest and bolster their evidence with prejudicial and uncorroborated informants'

reports and other inadmissible materials, and secretly submit it to the trial judge under the guise of obtaining Brady determinations. The dangerous process, now officially sanctioned and well under way, can only be stopped by an immediate and authoritative intercession by this Court.

Indeed, one might quite understandably raise a question about the fairness and impartiallity of both the prosecutor and the trial judge under these circumstances, and their sense of responsibility for protecting the rights of those who stand before the bar accused, and

assuring the fair and proper administration of justice. Tumey v. Ohio, 273 U.S. 510 (1927); Berger v. United States, 295 U.S. 78 (1935).

II.

THE HARMLESS ERROR DOCTRINE WAS IMPERMISSIBLY APPLIED.

The harmless error doctrine was plainly impermissibly applied in this case. The due process flaw in the admittedly erroneous exclusion by the trial court of the two-part Pheterson letter is too fundamental to have been amenable to harmless error review. Vasquez v.

Hillary, No. 84-836, U.S. Supreme Court (decided January 14, 1986).

The opinion of the appeals panel is also plainly contrary to the established existing law of the Seventh Circuit; particularly in this close case where the panel also held that without Pheterson's testimony the evidence was insufficient to convict, and that Pheterson's credibility was highly suspect:

> "We need not stop to consider whether the error was of constitutional dimension . . . if rules of evidence are to command any respect, we must reverse convictions tainted by clear error where the accused might have been acquitted in the absence of the error."

> (Emphasis added). (Former Associate Justice Tom C. Clark, sitting by deisngation in United States v. Marrero, 486 F.2d 622, 627 (7th Cir. 1973).

The issuance of this Court's writ of certiorari is warranted, if not compelled in order to determine or more clearly define the legitimate and lawful boundaries of the harmless error doctrine.

III.

RACIALLY MOTIVATED PEREMPTORY EXCLUSION OF PROSPECTIVE JURORS IN FEDERAL CRIMINAL TRIALS.

Until this Court speaks and calls a halt to the practice, the indignity of

racially motivated peremptory exclusion of prospective jurors will remain just one more badge of slavery refusing to die. Jones v. Mayer Co., 392 U.S. 409 (1968), (see concurring Opinion by Douglas J.).

However, despite existing inter-circuit conflict on the question, now eclipsed by established case record conflict within the ranks of the seventh Circuit itself (see order of theCourt of Appeals with dissenting opinion by Judge Cudahy, App. D), no court, other than the Court of Appeals for the Seventh Circuit has upheld the holding of an ex parte

conference between the court and the prosecutor, to the complete exclusion of the defendant, as the proper means for determining whether there has been a violation either of the Fifth Amendment due process or Sixth Amendment fair and impartial jury trial. See McCray v. Abrams, 750 F.2d 113 (2nd CIr. 1984); Booker v. Jabe, No. 83-1136 (6th Cir., Oct. 29, 1985). The approach approved by the Court of Appeals in this case smacks more of star chamber, than any approved form of American jurisprudence, and can only aggravate and extend the practice. It cannot possibly assure the fair administration of justice.

CONCLUSION

Petitioner respectfully submits that it would be extremely difficlut to advance either a stronger or more justifiable reason for the issuance of the writ requested herein than the need to preserve public confidence in the integrity and stability of the judicial process.

That confidence is challenged to the point of being sorely shaken by the use, treatment and manifest abuse of the principles and standards of due process, the harmelss error doctrine, and the doctrine of Brady, indulged in by the Court of

Appeals for the Seventh Circuit in this case.

Finally, it being that this Court now has under advisement Batson, and the inter-circuit conflict produced by racially motivated use of the peremptory challenge, as portrayed in numerous state court proceedings, this case provides an excellent opportunity for this Court to determine, or set the Fifth and Sixth Amendment standards to be applied to the same problem in federal criminal proceedings.

For the reasons shown in this

petition, it is respectfully urged that the writ prayed for be granted.

Respectfully submitted,

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